IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.115 OF 2002

Mohamed Yusuf Salim Nurani
Age 28 years, residing at
Room No. 469, Block No.3,
Malvani Municipal Colony,
Malad (West), Mumbai - 400095 ...Appellant.

V/s

The State
(at the instance of the Mira
Road Police Station
Cr.No.I/259) ...Respondent.

Mr. Kuldeep Patil with Mr. Shahank Borade for the appellant.

Ms. S.V. Gajre, APP for the State.

CORAM: V.M. KANADE, J.

DATE: 2nd March, 2006

ORAL JUDGMENT:

1. Heard the learned Counsel for the appellant and the learned APP for the State.

2. The appellant is challenging the judgment and order passed by IIIrd Ad-hoc Additional Sessions Judge, Thane dated 18/1/2002 whereby the appellant was convicted for an offence punishable under section 392 of the Indian Penal Code and he was sentenced to suffer rigorous imprisonment for seven years and to pay fine amount of Rs 5000/- and in default of payment

of fine amount to suffer further simple imprisonment for one year.

3. The brief facts are that the appellant alongwith two accused were charged for committing dacoity of property viz. diamonds and cash from the complainant by threatening him by toy pistol. Therefore, a complaint was lodged by the complainant on 10/10/2000 at about 15.15 hours in which it was stated that he was robbed by five unknown persons near Bhyandar Police Station. After the said persons had taken away diamonds and cash from him, he raised hue and cry and the people, therefore, caught three persons; the present appellant being one of them. The present appellant was found in possession of the alleged diamonds and cash.

4. The learned Counsel appearing on behalf of the appellant submitted that the discovery of the diamonds had not been proved. He submitted that the evidence of the eye witnesses was inconsistent. He invited my attention to the testimony of the witnesses and submitted that the appellant was entitled to be acquitted. Alternatively, he submitted that if this Court comes to the conclusion that the appellant had committed an offence then looking at the nature of the

offence, the sentence may be reduced from 7 years to 5 years.

5. The prosecution has examined 7 witnesses. P.W. 1 - Badresh Dave did not support the prosecution case and he was declared as hostile witness. P.W. 2 - Dinesh Sheth who is a panch witness was examined by the prosecution regarding the panchanama of the place of incident. P.W. 3 - Rajendra Ghone was examined by the prosecution in support of the case of the complainant and also to prove the arrest of the accused. This witness also turned hostile. P.W. 4- Deepak Dave could not identify the assailants. He also stated in his cross-examination that he would not know from whose possession the diamonds were recovered by the police. Though much emphasis was laid by the learned Counsel for the appellant on the testimony of this witness, in my view, merely because the complainant was not in a position to identify the appellant in Court did not disprove the fact of robbery and that the appellant was arrested at the spot and the diamonds were recovered at his instance at the spot which fact has been established by P.W. 5 - Sanjay Patil who is a recovery panch. P.W. 7 Dada Jadhav also is an officer who has deposed about the arrest of the appellant alongwith other accused.

6. In my view, there is sufficient evidence against the present appellant as he was arrested on the spot alongwith the co-accused and the diamonds were recovered at his instance and merely because the complainant failed to identify the appellant that does not dilute the prosecution case in any manner in view of the arrest of the accused at the spot and the recovery of the diamonds which were identified by the complainant. The Trial Court had given cogent reasons while recording the findings. I do not see any reason to set aside these findings. The conviction of the appellant is, therefore, confirmed.

7. However, so far as the sentence is concerned, the sentence, in my view, is liable to be reduced. The appellant was arrested on 10/10/2000 and other co-accused have been acquitted by the Sessions Court. He is in jail since the date of his arrest. The appellant has used a toy pistol and no person was grievously injured or hurt in the incident. The accused was not carrying any lethal weapon. Taking into consideration these facts, sentence is reduced to one which the appellant had already undergone.

8. In the result, the appeal is partly allowed. The

conviction is confirmed. The appellant to be released forthwith unless he is otherwise required in any other case.

9. Appeal is accordingly disposed of.

V.M. KANADE, J.